

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDRE JONES, et al.,

Plaintiff(s),

v.

RABANCO, Ltd., et al.,

Defendant(s).

No. C03-3195P

ORDER ON DEFENDANTS' FIRST
MOTION FOR
DISQUALIFICATION OF
COUNSEL

This matter comes before the Court on the parties' in camera submissions to the Court regarding the issue of whether or not Plaintiffs' counsel from the Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim ("GTH") should be disqualified because of an alleged current or former representation of Rabanco's wholly-owned subsidiary Regional Disposal Corporation ("RDC"). Having reviewed the briefing on this issue, as well as all of the documentation submitted, and having heard oral argument on the matter, the Court GRANTS Defendants' motion to disqualify the attorneys for Plaintiffs from GTH. The Court finds that RDC is a current client of GTH and that RDC and Rabanco as entities are too interrelated to avoid an appearance of impropriety in this matter. The law is clear that lawyers may not represent an interest adverse to a current client. For this reason, GTH must be disqualified, effective as of the date of this order.

BACKGROUND

On February 20, 2006, Plaintiffs' attorney Peter Moote associated GTH lawyers Darrell Cochran, Maria Lorena Gonzalez, and Walter Beck to help him in the representation of the thirteen

1 Plaintiffs in this action. (Dkt. No. 307). In early March, Stephanie Bloomfield of the GTH firm ran a
2 conflicts check and found that GTH had represented RDC on a long-haul waste contract dispute
3 against LRI in Pierce county from 2000 to 2002.¹ The records attached to Ms. Bloomfield's
4 declaration reflect that when she did the conflicts check, three open matters regarding the RDC/LRI
5 dispute appeared, but she states that she considered that matter to be completed and concluded that
6 there was no conflict. (Bloomfield Decl. at 1 and Ex. A).

7 In May of this year Jeff Andrews, a Senior Vice President of Allied Waste, was in Seattle for a
8 mediation in this lawsuit and recognized GTH as the law firm that he believed represented Rabanco in
9 Pierce County. In support of this motion, Rabanco has also submitted several affidavits from
10 Rabanco executives expressing the view that the affiants understood GTH to be Rabanco and Allied
11 Waste's counsel in Pierce County. Although the parties agreed to disregard the potential conflict for
12 the purposes of the mediation, Defendants now bring this motion for formal disqualification of GTH.

13 GTH entered into representation of RDC, Rabanco, and Allied in 2000 regarding a dispute
14 with LRI in Pierce County over a contract to long haul waste to a landfill in Klickitat county. RDC is
15 wholly owned by Rabanco and shares staff and office space with its parent. Although GTH claims
16 that only RDC was formally its client, many of the internal memoranda between GTH staff refer to
17 the matter as "Rabanco." (See e.g. Verhoef Decl., Ex. D). Former Rabanco District Manager Bob
18 Berres hired GTH. He and Don Swierenga were key contacts at RDC and Rabanco during the LRI
19 litigation. Both of these men are also involved in the current case before the Court and could
20 potentially be called as witnesses. The main attorneys assigned to the case were Dennis Harlowe,
21 Ronald Leighton, and Brad Maxa. Tim Thompson, a non-lawyer lobbyist, was also assigned to the
22 case. In addition, up to 24 attorneys and paralegals in total worked on the RDC/LRI case at GTH.
23 Over the course of the case, which settled on the eve of arbitration, GTH billed RDC for \$567,371.62
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25

26 ¹The Court notes that appearing in court and giving notice of representation before a conflicts
check has been run is not advisable on any level.

1 in legal costs. The contract signed by RDC and LRI settling the case expires in 2011. (Defs' Mot. at

2 1). The notice provision under that contract provides:

3 12.11 Notice

4 All communications under this Agreement must be in writing and are duly given when
5 (a) delivered by hand (with written confirmation of receipt), (b) sent by facsimile (with
6 written confirmation of receipt), provided that the communication also is mailed by
7 certified or registered mail, return receipt requested, or (c) received by the addressee,
8 if sent by a nationally recognized overnight delivery service (receipt requested). The
9 appropriate addresses and facsimile numbers for receipt are set forth below. A party
10 may designate by notice other addresses and facsimile numbers.

11 If to RDC: Regional Disposal Company
12 c/o WJR Environmental, Inc.
13 54 South Dawson Street
14 Seattle, WA 98314
15 Attention: _____
16 Facsimile No: (206) 332-7600

17 With a copy to:

18 Gordon, Thomas, Honeywell, Malanca,
19 Peterson & Daheim, P.L.L.C.
20 1201 Pacific Ave., Suite 2200
21 Post Office Box 1157
22 Tacoma, Washington 98373
23 Attention: Dennis S. Harlowe
24 Facsimile No.: (253) 620.6565

25 (Harlowe Decl., Ex. E). Shortly after this case settled, Dennis Harlowe, Ronald Leighton, and Tim
26 Thompson all left GTH. When they left, GTH assigned B.B. Jones as the new billing partner for the
this matter. Additionally, Brad Maxa continues to be a partner at the firm and several other attorneys
and staff who played lesser roles in the RDC/LRI matter are still employed at GTH. Brad Maxa has
stated that he has "explicitly refrained from any contact with the attorneys working on the Jones case.
. ." (Maxa Decl. at 9). Although GTH handled a few small matters regarding issues with the
RDC/LRI contract after the case settled, Mr. Maxa also states that neither he nor anyone at GTH has
done work for RDC, Rabanco, or Allied on any matter since November 2002, despite the fact that
these organizations have been involved in several legal matters since that time. (Id. at 4). Mr. Maxa

notes that RDC and Rabanco did not contact GTH about defending them in the current lawsuit. (Id.).

ANALYSIS

I. Framework Under the Rules of Professional Responsibility

It is the Court's duty to resolve allegations that arise concerning attorney conflicts of interest because the Court is authorized to supervise the conduct of the members of its bar. Oxford Systems, Inc. v. Cellpro, Inc., 45 F. Supp. 2d 1055, 1058 (W.D. Wash. 1999). The conduct of the attorneys practicing before this Court is governed by the Washington Rules of Professional Conduct ("RPC"). Id. The burden of proof in such matters rests with the firm whose disqualification is sought. Amgen, Inc. v. Elanex Pharmaceuticals, Inc., 160 F.R.D. 134, 140 (1994).

II. Is RDC a Current Client of GTH?

Under Washington RPC 1.7,

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents in writing. . .

RPC 1.7(a). Whether or not a current attorney-client relationship exists is a question of fact. Bohn v. Cody, 119 Wn. 2d 357, 363 (1992); See also Oxford Systems, Inc. v. Cellpro, 45 F. Supp. 2d 1055, 1059 (W.D. Wash. 1999). "The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters." Bohn, 119 Wn. 2d at 363. Washington courts have held that another key factor that is determinative of whether or not the attorney-client relationship exists is the subjective belief of the client. Id. However, this belief must be reasonably based on the factual circumstances of a particular case. Id. Looking at all of the circumstances before the Court on this motion, the Court finds that Defendants' belief that GTH is their representative in Pierce county is a reasonable one.

The Court construes the inclusion of GTH as a contact under the contract settling the LRI matter as evidence that there was intent for GTH to represent RDC and Rabanco on any future issues

1 that might arise under that contract. Indeed, GTH does not deny that it performed this type of work
2 for RDC shortly after the settlement. The Court also notes the fact that the LRI matter remains an
3 open one in the GTH files. The Court views the failure to formally close the LRI matter as evidence
4 that GTH had intended to keep RDC and Rabanco as clients and hoped to represent them on future
5 disputes. This conclusion is strengthened by the fact that GTH is paying for the storage of 49
6 bankers boxes of documents related to the LRI matter in GTH's off-site storage facility, thereby
7 making itself available to promptly respond to future requests from RDC for legal work.

8 Although the Court acknowledges GTH's argument that neither RDC, Rabanco, nor Allied
9 Waste has contacted the firm in over three years, it does not find this argument by itself persuasive.
10 GTH also asserts that the main attorneys at the firm who represented RDC are now gone, including
11 Mr. Harlowe, whose name is provided in the contract as the contact person at GTH should a dispute
12 arise under the RDC/LRI contract. The fact that these attorneys are longer at the firm, however,
13 does not eliminate any responsibility that GTH might have to RDC under that contract. Comment
14 Four to ABA Model Rule 1.3, outlining an attorney's duties of diligence, provides that "[d]oubt
15 about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in
16 writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs
17 when the lawyer has ceased to do so." In this spirit, the Court finds that GTH could easily have sent a
18 letter to RDC asking it to amend this contact information, or informing it of Mr. Harlowe's new
19 contact information, if the firm had really not wished to serve as a contact point under the contract.
20 However, there is no evidence currently before the Court that GTH took such a step. Without
21 evidence that GTH took steps to amend the notice provision in the contract, the Court finds that
22 inclusion of GTH as a point of contact in the contract, along with the other circumstances outlined,
23 created a reasonable belief on the part of the client that the firm named in the contract was still
24 representing it on matters related to the contract.

25 Other courts have held that "once established, a lawyer-client relationship does not terminate
26 easily. Something inconsistent with the continuation of the relationship must transpire in order to end

1 the relationship.” SWS Financial Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398 (N.D. Ill.
2 1992). The Court can find nothing in this record that constitutes an event inconsistent with the
3 continuation of the attorney-client relationship between GTH and RDC. When asked by the Court at
4 oral argument what this event could be, GTH attorney Stephanie Bloomfield responded, “Silence.
5 Three years of silence.” This answer was meant to reference the break in contact between GTH and
6 RDC. However, the Court does not find that three years of no contact between an attorney and
7 client, without more, constitutes an event inconsistent with representation. As noted, there was no
8 evidence submitted that formal notices were sent to RDC when either Mr. Leighton or Mr. Harlowe
9 left the firm; the files were not closed electronically; nor were RDC’s documents returned to them.
10 On the contrary, GTH assigned a new billing partner, B.B. Jones, to the matter when Leighton and
11 Harlowe left and kept RDC’s documents in storage. The Court finds that these actions are consistent
12 with the expectation by a firm that it would be representing an entity in future disputes. Indeed, GTH
13 admits that RDC did return to it on subsequent occasions during 2001 and 2002 when there were
14 issues with the contract between it and LRI.

15 GTH argues vigorously that it should not be disqualified from representation because the
16 current case is not “substantially related” to the LRI matter. In making this argument, GTH relies
17 heavily on State of Washington v. Hunsaker, 74 Wn. App. 38 (1994) for support. However, this case
18 concerns a firm’s representation of a person adverse to a *former* client. The Court in this matter does
19 not reach the analysis for attorney disqualification in instances where a the firm is adverse to a former
20 client under RPC 1.9 because the Court finds that RDC is a current client of GTH’s under RPC 1.7.

21 **III. Can GTH be considered to Represent Rabanco and/or Allied?**

22 The Court’s inquiry does not end with the finding that GTH is a current representative of
23 RDC. The Court must determine whether it is also represents Rabanco and/or Allied. RDC is a
24 wholly-owned subsidiary of Rabanco and Rabanco is wholly owned by Allied Waste, Inc. RDC and
25 Rabanco share office space, as well as employees. Some of the RDC executives, such as Bob Berres
26 and Don Swierenga, who submitted affidavits in support of this motion and who communicated with

1 GTH during the LRI matter were also executives at Rabanco during the time period at issue in the
2 employment discrimination case before this Court. Additionally, many of the internal memos of
3 attorneys at GTH who worked on the LRI matter referred to Rabanco as if it were their client.
4 Although there is not a large body of case law in this area, courts tend to take a pragmatic approach
5 to the “consequences of the attorney's relationship with the corporate family.” Morrison Knudsen
6 Corp. v. Hancock, Rothert & Bunshoft, 69 Cal. App. 4th 223, 253 (1999). The Ninth Circuit has held
7 that “[f]iduciary obligations and professional responsibilities may warrant disqualification of counsel
8 in appropriate cases even in the absence of a strict contractual attorney-client relationship.” Trone v.
9 Smith, 621 F. 2d 994, 1002 (9th Cir. 1980). Here, the Court finds that given the overlap of staff and
10 the intermingling of operations, especially between RDC and Rabanco, the appearance of impropriety
11 would be too great if GTH were to continue to represent Plaintiffs against Rabanco and Allied in this
12 matter. For this reason, the Court finds that it must disqualify the GTH firm as representatives for
13 Plaintiffs in the case currently before this Court, effective as of the date of this order.

14 The Clerk of the Court shall direct a copy of this order be sent to all counsel of record.

15 Dated: August 3, 2006

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19 Marsha J. Pechman

20 United States District Judge

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